

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

SCOPE OF REVIEW OF SYSTEM FOR)
REGULATING MARKET-DOMINANT) Docket No. RM2016-9
RATES AND CLASSES)

**RESPONSE OF
MPA—THE ASSOCIATION OF MAGAZINE MEDIA,
ALLIANCE OF NONPROFIT MAILERS,
ASSOCIATION FOR POSTAL COMMERCE
AND DIRECT MARKETING ASSOCIATION
TO PETITION OF UNITED STATES POSTAL SERVICE FOR
RULEMAKING ON SCOPE OF TEN-YEAR REVIEW PROCEEDING
(April 13, 2016)**

On April 7, 2016, the Postal Service petitioned the Commission to begin a separate rulemaking on “the scope of [the Commission’s] forthcoming review” of the current “system for regulating rates and classes for market-dominant products established under” certain subsections of 39 U.S.C. § 3622. The petition should be denied for the following reasons:

1. 39 U.S.C. § 3622(d)(3) directs the Commission, ten years after the enactment of the Postal Accountability and Enhancement Act (“PAEA”), Pub. L. 109-435, 120 Stat. 3198 (2006), to “review the system for regulating rates and classes for market-dominant products established under this section.” Section 3622(d)(3) specifies a two-step review process. First, the Commission is to “determine if the system is achieving the objectives in subsection [3622(b)], taking into account the factors in subsection [3622(c)].” *Id.* Second, if the Commission “determines, after notice and

opportunity for public comment, that the system is not achieving the objectives in subsection (b), taking into account the factors in subsection (c), the Commission may, by regulation, make such modification or adopt such alternative system for regulating rates and classes for market-dominant products as necessary to achieve the objectives.” *Id.*

2. The review proceeding is to occur “[t]en years after the date of enactment of the” PAEA.” *Id.* The tenth anniversary of the enactment of the PAEA falls on December 20, 2016, more than eight months from now. See 120 Stat. 3198 (Dec. 20, 2006).

3. The Postal Service’s April 7 petition for rulemaking asks the Commission to begin the requested rulemaking without waiting until December 20, 2016. The Postal Service also asks the Commission to limit the rulemaking to the legal question of “which aspects of the current market-dominant regulatory structure” are “subject to potential modification or replacement” by the Commission “as part of the review.” USPS Petition at 1-2. The Postal Service asks the Commission to resolve the question without considering how well the current “system’ is working or what changes should be made. *Id.* at 2-5. The Postal Service also requests that the Commission decide this legal question quickly, with only two rounds of comments, “rather than [through] an open-ended public inquiry docket.” *Id.* at 5.

4. The Commission had an opportunity to address the threshold legal issue raised by the Postal Service 18 months ago. On October 28, 2014, a coalition of mailer associations, including the undersigned parties, submitted a white paper to the Commission arguing that Section 3622(d)(3) did not authorize the Commission to revise

the CPI cap established by Sections 3622(a) and (d). The mailers asked the Commission to place the white paper on the public record so that other stakeholders could comment on it. The Postal Service filed a response to the mailers' white paper with the Commission on or about May 14, 2015. The Postal Service "suggest[ed]" in its cover letter to the Commission that it "open an appropriate public inquiry or rulemaking docket" on the issue. The Commission did not, however, solicit further comments on the mailers' white paper or the Postal Service's reply. Instead, the Commission apparently has decided to defer beginning its ten-year review of the statute until the tenth anniversary of the enactment of the PAEA. We assume that the Commission plans a two-stage proceeding that parallels the sequence indicated by Section 3622(d)(3) itself: first, a review of how well the regulatory "system" is working; second, if the "system" is found to be in need of change, an inquiry into specific proposed changes.

4. This approach, while differing from the procedure proposed by the mailers in 2014 and the Postal Service in 2015, is certainly within the discretion of the Commission to adopt. Administrative agencies regularly adopt bifurcated procedures.¹ And assessing the performance of the current system before considering potential changes is the specific sequence indicated by Section 3622(d)(3).

¹ See, e.g., *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106, 1110 (D.C. Cir. 2015) (describing two-phase procedure used by board); *Williams v. Johnson*, 776 F.3d 865, 867 (D.C. Cir. 2015) (three-phase procedure); *NetworkIP, LLP v. FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008) (noting authority of agencies to bifurcate a case into two phases); *Renal Physicians Ass'n v. U.S. Dept. of Health and Human Services*, 489 F.3d 1267, 1270 (D.C. Cir. 2007) (two-phase rulemaking); *WorldCom v. FCC*, 238 F.3d 449, 445-46 (D.C. Cir. 2001).

5. Moreover, this approach offers several advantages. First, waiting to begin the review until December 20, 2016, will avoid any question about whether the Commission began the ten-year review prematurely. Section 3622(d)(3) directs the Commission to “review” the regulatory system “ten years after” December 20, 2006. “Review” encompasses the development of the record and the Commission’s analysis of it, not just the issuance of the final decision. The questions of whether the CPI cap is part of the “system” —or outside it—is a necessary part of the “review.”

6. Reviewing the performance of the current “system” and, if necessary, considering the various proposals from interested parties before modifying the system, is also likely to lead to a more informed decision on the scope of Section 3622(d)(3) than deciding the question in the abstract, without knowing what criticisms and defenses of the present system will be offered by its stakeholders, and what specific changes to the system will be proposed. The undersigned parties continue to believe, for the reasons explained in their 2014 White Paper, that text and structure of Section 3622(d)(3) exclude the CPI cap from the 10-year review. If the Commission disagrees, however, it will need to analyze the purposes and policies underlying the CPI cap, and the likelihood that eliminating the CPI cap would promote or frustrate them. Even the initial *Chevron* step 1 inquiry into whether a statute is ambiguous entitles a reviewing court to use traditional canons of construction, including the “text, structure, purpose and history” of the statute. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); accord *Petit v. Dept. of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012). Hence, determining the “scope” of Section 3622(d)(3), as the Postal Service now defines the issue, would require the mailers, other parties and the Commission to front-load much of the factual record needed for “review” of the existing system into the ostensibly

preliminary litigation over the scope of the Commission's authority. The mailers have been planning and budgeting their cases on the assumption that their comments would be due after, not before, December 20. Accelerating the timetable of the case as the Postal Service now proposes would prejudice the mailers and deprive the Commission of a full record.

7. Determining the performance of the current "system" before considering changes to it could also render moot the thorny statutory and constitutional issues that the broad scope of review contemplated by the Postal Service would entail. If the Commission finds that the current "system" of regulation is accomplishing its main objectives, the Commission may never need to resolve the troublesome question of whether Section 3622(d)(3)—and the Presentment Clause of the Constitution—authorize the radical transformation of the CPI cap sought by the Postal Service. Avoiding those issues to the extent possible would be prudent. Indeed, the constitutional-doubt canon of construction requires that agencies avoid construing statutes in such a way as to raise serious doubts about their constitutionality. *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *Lowe v. SEC*, 472 U.S. 181, 227 (1985); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

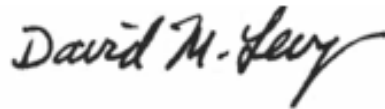
8. The Postal Service has failed to identify any short-term emergency that warrants the Postal Service's proposed rush to judgment. *Cf.* Petition at 2, 5. The Postal Service's March 24, 2016 monthly financial report to the Commission for February reveals that year-to-date controllable operating income is now at \$1.85 billion, about \$650 million better than the \$1.2 billion planned by the Postal Service for this

period and about \$450 million better than during the same period a year earlier. To be sure, the Postal Service is not making the annual prepayments to the Retiree Health Benefits Fund nominally required by Congress. But the Congress and the Treasury have allowed the Postal Service to defer these payments for several years, and no change to this policy is in sight. The Commission has time to conduct the ten-year review in an orderly fashion and according to the timetable prescribed by Congress.

CONCLUSION

Wherefore, the undersigned parties respectfully request that the Postal Service's April 7 petition for rulemaking be denied.

Respectfully submitted,



Matthew D. Field
Ian D. Volner
VENABLE LLP
575 7th Street, N.W.
Washington DC 20004
(202) 344-2821
mfield@venable.com

*Counsel for Association for Postal
Commerce*

Christopher Oswald
Vice President, Advocacy
DIRECT MARKETING ASSOCIATION
1615 L Street, NW, Suite 1100
Washington DC 20036
(202) 861-2414
coswald@the-dma.org

Counsel for Direct Marketing Association

David M. Levy
VENABLE LLP
575 7th Street, N.W.
Washington DC 20004
(202) 344-4732
dlevy@venable.com

*Counsel for MPA—The Association of
Magazine Media and Alliance of Nonprofit
Mailers*

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